

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 97-0397 ITC  
GROSS INCOME TAX  
FOR TAX PERIOD: 1992 THROUGH 1995**

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**ISSUES**

**I. Adjusted Gross Income Tax: Sales Factor: Income of Corporate Partners**

**Authority:** IC 6-3-2-2; 45 IAC 3.1-1-50; 45 IAC 3.1-1-153.

The taxpayer protests the Department's failure to include the gross receipts of a foreign partnership in the denominator of the sales factor.

**II. Adjusted Gross Income Tax: Sales Factor: Sales of Capital Assets**

**Authority:** IC 6-3-2-2; 45 IAC 3.1-1-29,31; 45 IAC 3.1-1-50,51; 45 IAC 3.1-1-58,62

The taxpayer protests the Department's failure to include the gross receipts from sales of capital assets in the denominator of the sales factor.

**III. Tax Administration: Penalty**

**Authority:** IC 6-8.1-6-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayer protests the imposition of a negligence penalty.

**STATEMENT OF FACTS**

The taxpayer is a New Jersey corporation that manufactures, distributes and sells tangible personal property. Taxpayer is involved in operations in the fifty states as well as in numerous foreign countries. Further facts will be described in issue discussion, as warranted.

**I.      Adjusted Gross Income Tax:              Sales Factor: Income of Corporate Partners**

**DISCUSSION**

Taxpayer is a corporate partner in a foreign partnership. Taxpayer is a member of this partnership because the government of the foreign country requires all those who wish to do business in this country to partner with a domestic. Taxpayer maintains control of 95% of the partnership investment, voting rights, etc. Taxpayer controls all of the day to day activity in all phases of the operation. Taxpayer's foreign partnership is for all intents and purposes unitary with Taxpayer.

The Department's regulations dictate how to treat a Taxpayer who is a corporate partner of a foreign partnership, operating in a unitary relationship. 45 IAC 3.1-1-153(b) would seem to require Taxpayer's income to be apportioned by Indiana's three-factor formula, with some modification. With respect to the sales factor, the only modification is the exclusion of intercompany sales. Taxpayer and the partnership have no such sales.

Taxpayer also notes that the auditor included the partnership figures in the denominator of both the property and payroll factors. Failure to include the partnership numbers in the denominator of the sales factor may have been inadvertent. Regardless, the Department's regulations are clear on how to treat a corporation in Taxpayer's situation. The Department concludes that the gross receipts of the partnership should have been included in the denominator of the sales factor, per the regulations.

**FINDING**

The taxpayer's protest on this issue is sustained.

**II.      Adjusted Gross Income Tax:              Sales Factor: Sales of Capital Assets**

**DISCUSSION**

Taxpayer sold a number of capital assets throughout the tax years in question. Taxpayer claims that these were business income producing assets and therefore the income from sales of these assets are apportionable and should be included in the denominator of the sales factor, citing 45 IAC 3.1-1-50,51. Taxpayer offers a breakdown of the sales by jurisdiction to demonstrate both the total amount of asset

sales and the amount attributable to each jurisdiction.

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The auditor included in the sales denominator only the proceeds from sales that are apportionable. The Taxpayer claims that not including all sales of assets, including those from foreign sales and sales allocable to taxpayer's commercial domicile, is contrary to IC 6-3-2-2(l), 45 IAC 3.1-1-50 and 45 IAC 3.1-1-51. However, the same regulation states that sometimes certain gross receipts should be disregarded to effectuate an equitable apportionment. 45 IAC 3.1-1-50. The income from foreign sales and allocable income is not subject to apportionment and is properly excluded from the denominator of the sales factor. The Department only included in the denominator of the sales factor receipts not previously classified as an exclusion or as nonbusiness income. Sales apportionable to individual states as business income *were* included in the denominator. The Taxpayer offers no evidence that the exclusion of sales, not subject to apportionment, has resulted in an inequitable apportionment. Without such evidence, the exclusion of nonapportionable sales from the denominator is consistent with the law.

### **FINDING**

The taxpayer's protest on this issue is denied.

### **III. Tax Administration: Penalty**

### **DISCUSSION**

The Department can impose a ten percent (10%) negligence penalty under IC 6-8.1-10-2.1. This code section states, in pertinent part, that if “the deficiency determined by the Department was due to reasonable cause and not willful neglect, the Department shall waive the penalty.”

Further, 45 IAC 15-11-2 states that “negligence on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary, reasonable taxpayer.”

The taxpayer must demonstrate that its actions involved the use of reasonable care, caution, or diligence, in attempting to comply with the law in order to avoid a penalty. The taxpayer has failed to do this with respect to the assessed tax for tax year ending 12/31/92. In fact, the tax assessed for year ending 12/31/92 was an issue in a previous audit. The taxpayer's arguments and evidence do not show that the taxpayer exercised reasonable care, caution or diligence in its failure to have included the assessed tax.

### **FINDING**

The taxpayer's protest of the penalty for tax year ending 12/31/92 is denied. The taxpayer's protest of

the remainder of the assessed penalty is sustained.